BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA K. GRAY	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,029,798
	)	
TARGET CORPORATION	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the October 19, 2006 preliminary hearing Order entered by Special Administrative Law Judge E. L. Lee Kinch.

ISSUES

The Special Administrative Law Judge (SALJ) found the claimant sustained a compensable right lower extremity injury on June 8, 2006, which arose out of and in the course of employment and that proper notice was given to respondent. The SALJ further ordered medical treatment as well as temporary total disability benefits beginning June 9, 2006.

In its application for review, the respondent requested review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether timely notice was given; (3) whether the SALJ erred in ordering temporary total disability compensation and medical compensation; and, (4) whether the SALJ erred in considering Dr. Bruce Buhr's letter which was forwarded to the Court after the preliminary hearing. In its brief to the Board the respondent just listed as issues whether claimant suffered accidental injury arising out of and in the course of employment and whether the SALJ erred in considering Dr. Buhr's report.

Claimant argues the SALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

A few days after the preliminary hearing was held, the claimant's counsel sent the ALJ a letter and enclosed a copy of a letter received from Dr. Bruce Buhr regarding causation for claimant's right knee injury. The respondent faxed an objection to the ALJ's consideration of Dr. Buhr's letter as it was not introduced as an exhibit at the preliminary hearing. At the conclusion of the preliminary hearing there was no request by either party for an extension of time to present additional evidence.

Respondent objected to claimant's counsel's attempt to submit evidence that was not a part of the record before the Administrative Law Judge at the time of the preliminary hearing. K.S.A. 44-555c(a) grants review by the Board "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The Board has consistently held that, absent a stipulation thereto by all parties, no new evidence may be admitted after the record is closed by the ALJ. Therefore, the attempt to introduce the September 14, 2006 letter from Dr. Buhr to claimant's counsel by enclosing a copy in a letter to the ALJ is procedurally incorrect. This Board Member will not consider Dr. Buhr's September 14, 2006 letter as part of the preliminary hearing evidentiary record.

Claimant's job duties consisted of unloading products from trucks and then stocking those items on the store shelving. She would bend and flex her knee as she unloaded stock from a truck onto a pallet and then bend and flex her knee as she would remove the stock from the pallet onto the shelving. And she would climb a ladder or step stool to stock the top shelves. As she performed those job duties, initially in the dairy department, she gradually began having knee pain. Although she changed shifts and was moved from the dairy department, her job duties of unloading trucks and then stocking shelves did not change.

When claimant began having problems while working in the dairy department she told Emanuel Manning, apparently her supervisor, about her right knee pain. But she never stated it was related to work nor requested medical treatment.

Claimant sought medical treatment on April 18, 2006, with her own physician, Dr. Val Brown. The doctor's progress notes from that visit indicate claimant was complaining of her right knee popping and swelling and that her knee popped at work. The note concluded with the notation "prob. work related."[1] Dr. Brown referred claimant to Dr. Robert Eyster who administered a series of three Synvisc injections in claimant's knee. When this treatment did not provide claimant much relief, Dr. Brown referred claimant to Dr. Bruce Buhr. Dr. Buhr recommended arthroscopic surgery.

[1] P.H. Trans., Cl. Ex. 5.

Claimant told Mr. Manning she was going to have knee surgery and he said he would make sure she was not listed on the work schedule. But she never stated she thought her knee problem was work-related.

Claimant's last day worked was June 8, 2006. On June 9, 2006, Dr. Buhr performed surgery on the claimant's right knee. Claimant testified she delivered a written request for workers compensation benefits to the respondent on June 13, 2006. Claimant never told respondent she felt her knee pain was work related before she had the surgery. She did not know why she had not advised respondent. She simply had the surgery and because she was going to be off work she then applied for workers compensation benefits.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[2] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[3] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[4] The existence, nature and extent of the disability of an injured workman is a question of fact.[5] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[6]

Claimant testified that she had a gradual onset of right knee pain as she performed her job duties for respondent. Dr. Brown's progress note from his examination of claimant on April 18, 2006 contained the notation that her condition was probably work-related. This Board Member affirms the SALJ's determination that claimant met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment as a result of a series of micro-trauma injuries to her right knee.

Respondent alleged claimant failed to provide timely notice. The claimant alleged that she suffered a series of microtraumas each and every day worked up until her last day

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[2] K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[3] K.S.A. 44-501(a).

[4] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[5] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

worked on June 8, 2006. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.[7]

K.S.A. 2005 Supp. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[8] (Emphasis added.)

In this case, claimant was neither taken off work nor restricted from performing the work which caused her condition. Instead, claimant left work to have the surgery but it was not at the direction of an authorized physician.

The claimant attributed her knee pain to work and was aware her condition was worsening as she continued working. However, K.S.A. 2005 Supp. 44-508(d) makes no mention of the date of accident being tied to a claimant's realization as to the cause of her problems.

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[7] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); and *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003)

[8] K.S.A. 2005 Supp. 44-508(d).

A possible date of accident could be when a claimant is diagnosed with a work-related condition, as noted in K.S.A. 2005 Supp. 44-508(d)(2). But that fact must be communicated to the claimant "in writing". There is no indication in this record that claimant received written communication that her condition was work-related.

The last "date of accident" possibility contained in the statute is dependent upon a claimant giving written notice to the employer of the accident. Here, on June 13, 2006, claimant gave written notice of her work-related accident. This date of accident would make claimant's notice timely.

It would also create the result of having a date of accident after the last date claimant worked. When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date after the last day worked or at a time when the injured worker was no longer employed leads to an unreasonable result.

K.S.A. 2005 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that her condition was diagnosed as work related or the date she gave written notice to the employer of the injury. There was no evidence claimant received written notification that her condition was diagnosed as work related before she provided written notice to the employer.

But claimant did provide respondent written notice of her injury on June 13, 2006. Consequently, under the plain language of the statute, her date of accident is June 13, 2006, and her notice was timely for the series of microtraumas occurring through her last day worked. Consequently, the SALJ's determination that the date of accident was the last day worked is modified in accordance with the foregoing but the determination that timely notice was provided is affirmed.

Respondent next argues the SALJ erred in awarding temporary total disability compensation and medical compensation. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[9] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[10]

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing. Moreover, K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation or medical compensation is not a question that goes to the jurisdiction of the ALJ. K.S.A. 44-534a specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation and medical compensation. Therefore, the SALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address these issues at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[9] K.S.A. 44-551.

[10] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[11] K.S.A. 44-534a.

as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, it is the finding of this Board Member that the Order of Special Administrative Law Judge E. L. Lee Kinch dated October 19, 2006, is modified to reflect that the September 14, 2006, letter from Dr. Buhr is not part of the September 14, 2006 preliminary hearing evidentiary record, the date of accident is June 13, 2006, and affirmed in all other respects.

IT IS SO ORDERED.

Dated this 31st day of January, 2007.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent
E. L. Lee Kinch, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge

[12] K.S.A. 2005 Supp. 44-555c(k).